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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1904.

No. 47.

FANNIE N. DRESSER CRAMER, TAYLOR A. SNOW and HENRY H. GAGE,
Plaintiffs in Error,

vs.

FREDERICK R. WILSON,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

Brief and Argument for Plaintiffs in Error.

FREDERICK W. BECKER,
ROBERT A. CHILDS and
CHARLES HUDSON,
Solicitors for Plaintiffs in Error.

Geo. Hermann Co., Printers, Chicago.

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STATEMENT.

ORIGINAL BILL.

This was a bill in chancery filed February 1, 1888 (p. 6), by plainiff in error Fannie N. Dresser (now Fannie N. Dresser Cramer), in the Superior Court of Cook County, for the partition of certain real estate described in the bill located in the city of Chicago, between herself and Lillie Belle Dresser, who are alleged to be the owners of the patent

title, the former being the owner of an undivided two-thirds and the latter of an undivided one-third thereof, pursuant to Chapter 106, Revised Statutes of Illinois, providing *inter alia* (Section 39) that "the court may investigate and determine all questions of conflicting or controverted titles, remove clouds * * * and invest title by their decrees with the parties to whom the premises are allotted."

Henry H. Gage and Julia Wilson, it was alleged, claim some interest in said land and were made parties.

Shortly after the bill was filed defendant in error Wilson appeared in court and suggested the death of Julia Wilson, of whom he was the devisee, and asked to be made party to the suit. Accordingly he was made a party defendant, and the bill abated as to Julia Wilson.

WILSON'S PLEA.

April 18, 1888, he filed a sworn plea (p. 44) setting up that Julia Wilson by virtue of a certain deed made and executed by him to her July 6, 1877, had title to said property until the day of her death (Dec. 15, 1887); that said deed was in the nature of a trust deed; that for more than twelve years prior to said deed he was in possession of said property; that after said deed she was in possession till her death, when it came back to him as sole devisee and heir, and he has since been in possession.

AMENDED BILL AND ANSWERS.

April 1, 1889, the bill was amended (p. 9) by alleging that Frederick R. Wilson was, on or about August 31, 1878, adjudged a bankrupt in the U. S. District Court in and for the Northern District of Illinois; that R. E. Jenkins was duly appointed his assignee, to whom was issued a proper deed of assignment of all of said Wilson's property; that

said Wilson then held all the equitable interest in the property in question which was passed by the deed from Frederick R. Wilson to Julia Wilson, dated July 6, 1877, and recorded March 14, 1885, in the nature of a deed of trust for the security of an alleged indebtedness; that the interest of F. R. Wilson as *cestui que trust* was a legal and proper asset of his estate which became vested in said Jenkins as assignee.

ASSIGNEE'S ANSWER.

Jenkins is made a party and files an answer, May 8, 1889 (p. 12), admitting the allegations of the bill as to Wilson's bankruptcy, his appointment and qualification as assignee and his receipt of a deed of conveyance from the register in bankruptcy of all of the estate real and personal of said bankrupt; and alleging that at the date of said deed there was standing of record in said bankrupt a claim of title, or title in and to the real estate (in question), but the value or character of such title he is unable to state; but that whatever such title was it then and there by virtue of said deed became and was vested in him as assignee, and should be sold and apportioned for the benefit of the creditors of Wilson. That the bankrupt did not mention said property in his schedule, and that it did not come to the knowledge of this defendant that said bankrupt was interested therein until since the commencement of this suit. That it is proper for this court to ascertain and determine what interest was in fact in said Wilson which doth now vest in this defendant and that this defendant as assignee be thus enabled to sell the same at public auction for the benefit of said bankrupt estate. That said Wilson has now no interest in said land, but that whatever interest he had at the time of said bankruptcy proceedings is vested in defendant as assignee; and

prays that this court may so find and order, as by the provision of the statute of Illinois in relation to partition it is its right and duty to do.

GAGE'S ANSWER.

Henry H. Gage answered said amendment (Appendix), making his former answer a part of this and admitting the bankruptcy proceedings as set out in the amendment and that Wilson has no interest in the real estate in question, but on the contrary stating that all of Wilson's interest passed to R. E. Jenkins his assignee by a register's deed, and that said assignee alone represents the alleged claim of title of said Wilson; that Wilson filed a plea herein stating that Julia Wilson had title to said property by virtue of his deed to her of July 6, 1877, which he swore was in the nature of a trust deed; defendant says said deed was not recorded until 1885 and that, at the time of its record, the title had passed to Wilson's assignee; that Wilson did not schedule said property, nor set out his liability to Julia Wilson; that the said deed was a fraud, and tended to hinder and delay his creditors, and that in consequence of said fraud the said Wilson cannot obtain a title in and to said property through said Julia Wilson as against said assignee in bankruptcy.

F. R. Wilson filed an answer, admitting that he became bankrupt as alleged, but denying that he had any interest in said lands at that time.

SUPPLEMENTAL BILL AND ANSWERS.

October 24, 1889, complainant filed a supplement (p. 16), alleging that since the filing of the original bill and the amendment thereto the said Robert E. Jenkins as assignee has sold the said premises and executed a deed therefor

to one Taylor A. Snow; that defendant H. H. Gage has purchased the right, title and interest of Lillie Belle Dresser.

COUNT'S ANSWER.

Snow answered that Jenkins had sold Wilson's and his (Jenkins') interest in said premises to him (Snow) pursuant to an order of the bankruptcy court, and had issued a deed therefor to defendant.

WILSON'S ANSWER.

Wilson answered, denying that he had any interest in said premises at the date of his bankruptcy. States he had conveyed all his right, title and interest therein to Belle Wilson prior to his bankruptcy. Denies that said deed to her was a trust deed or in the nature of a trust deed, or that she held in trust for him; states that it was an absolute deed at the time of delivery.

FIRST DECREE.

The lower court on the first hearing entered a decree partitioning the premises, denying Wilson's alleged claim of title, and holding that his interest passed to Snow by the assignee's sale.

This decree on writ of error sued out by Wilson was reversed by the Supreme Court of Illinois (168 Ill., 307), mainly because the evidence failed to show title from the government, as alleged, and because as to the bankrupt proceedings it was imperfectly abstracted, the court saying that "nothing more is here shown than that the assignee, not by order of court, sold whatever interest Wilson had on the 30th day of August, 1870, to Snow; but the evidence shows that at that time he had an interest, having more than a year prior to that date, July 6, 1877, conveyed it to Belle Wilson." The court also said: "Manifestly,

then, the case must turn on whether the Superior Court erred in finding against him (Wilson) in his claim of title, on the ground that it was vested by the assignee's sale and conveyance to Snow." Leave was given in the reversing order to allow amendments of pleadings and to offer additional evidence (p. 23).

AMENDED BILL AND ANSWERS.

Complainant, June 29, 1900, filed an amended bill (p. 24), setting up title from the government in detail; alleging that Lillie Belle Dresser has conveyed her interest to Gage, who also claims some interest by virtue of certain tax deeds, of no effect on title; that Wilson claimed some interest, but in August, 1878, he was adjudged a bankrupt in the U. S. District Court in and for the Northern District of Illinois; that Robert E. Jenkins was duly appointed assignee, qualified and entered upon the discharge of his duties as such; that a proper deed of assignment was made and executed to him, whereby all the personal and real property and all right, title and interest therein of the bankrupt became vested in his assignee. That prior to said deed of assignment said Wilson had executed a deed of said property, dated July 6, 1877, and recorded March 14, 1885, to Julia Wilson, now deceased, but that said deed was in the nature of a trust deed only, and the equity of redemption therefrom and title to the property passed to and vested in said Jenkins by the assignment aforesaid; that Julia Wilson had no interest in said property except as security for an alleged indebtedness; that the interest of F. R. Wilson as *cestui que trust* was a legal and proper asset of his estate as bankrupt which became vested in his assignee; that the said indebtedness, if any, has long since been paid; that the assignee has sold said premises to Snow who claims some interest therein.

Wilson's Answer.

Wilson answered (p. 30), denying that the Dressers were ever the owners in fee; admitting that August 30, 1878, he was adjudged a bankrupt, and that Jenkins was appointed assignee, to whom was executed a deed of assignment; that on or about July 6, 1877, he executed a deed of conveyance of said property to Julia Wilson, now deceased, but denies that it was in the nature of a trust deed or was given or received as security for any indebtedness, but avers it was an absolute quit claim deed; denies that he had any interest or title in said premises at the time of the assignment to Jenkins; avers that he obtained a deed to said premises in 1864, entered into possession thereof and so remained until the conveyance to Julia Wilson, paying all taxes and assessments for more than seven consecutive years, and that at the time of the delivery of said deed to Julia Wilson he was the owner in fee simple; that she then entered into possession and so continued until December 15, 1887, the time of her death, when the title became vested in him as sole devisee and heir at law of Julia Wilson; that since her death he has continued in possession; that he and his grantee and devisor had been in adverse possession thereof for over twenty years prior to the filing of the original bill of complaint.

Snow's Answer.

Snow answered (p. 32) that since the date of the assignee's answer application was made to the U. S. District Court for and an order obtained directing said assignee to sell the interest of the assignee and of the bankrupt in said premises; that said assignee sold the same to him, defendant, for $250, which was duly paid, and reported the sale to the court, which approved the same; and the said as-

signee executed and delivered to him (defendant) a deed of conveyance thereof, dated July 22, 1889. That, September 17, 1889, Wilson petitioned the District Court that said premises had been sold without notice, for an inadequate consideration, and that the lands had been acquired by him after his bankruptcy and were therefore not subject to sale by said assignee; that the cause was set for trial, evidence introduced, and the petition overruled. That by virtue of all the proceedings of said District Court and the deed aforesaid, this defendant became the owner of the said premises to the same extent as the said assignee and bankrupt, and that all the right, claim or interest of whatsoever nature of the said Wilson became and was thereupon vested in this defendant.

Snow's Cross Bill.

Snow also filed a cross bill (p. 42), alleging that Wilson on July 6, 1877, executed a deed purporting to convey to his sister said property, together with some 110 other pieces of property in Chicago; but that in fact said Wilson retained a secret interest therein; that it was in reality a trust deed and not an actual conveyance, and that Wilson still remained the real owner thereof; that the alleged consideration was only $2,000, whereas the premises in dispute were alone worth not less than $6,000, and the value of the whole property described was largely in excess of the recited consideration; that said F. R. Wilson in truth and fact remained the real owner of said premises after the date of said deed; that he remained in possession thereof, made leases in his own name, collected and retained the rents, and his sister had nothing to do with said premises till long after the bankruptcy proceedings; that at the date of said deed the grantor was insolvent, that he was indebted to divers

persons, amongst whom was one George A. Seaverns, who had a suit then pending against said grantor in the Superior Court of Cook county; that on July 14, 1877, judgment was rendered there for $1,000 and interest; that said deed was given for the express and fraudulent purpose of hindering and delaying the said Seaverns and other creditors in collecting their claims against him; that in pursuance of said fraudulent intent all of his property was by this deed placed in the name of his sister, although she then paid no consideration therefor; that at the date of said deed and until her death, in 1887, she was an invalid, confined to her bed, residing in the state of New Jersey, and at no time set foot within the state of Illinois; that said deed was not recorded for over eight years after its pretended date, and that the making of said pretended deed in the form of a deed absolute when it was merely a trust deed, keeping it from the records and going into bankruptcy were merely for the purpose of hindering and delaying his creditors. That said Wilson filed his petition in bankruptcy, was adjudged bankrupt, R. E. Jenkins appointed his assignee, and his interest in said premises carefully concealed until after the filing of the bill of complaint herein, when he filed a plea calling said deed a trust deed; that afterwards Seaverns petitioned the bankruptcy court to order sold the interest of said bankrupt, which was so ordered and sold to this defendant. Prays that said deed may be set aside, etc.

Gage's Answer.

Gage answered (p. 35), admitting most of the allegations of the amended bill and setting out in detail his tax deeds.

Evidence on Second Hearing.

Upon the second hearing evidence was introduced showing at the commencement of the suit title in fee to said

premises deraigned from the government by an unbroken chain of title in complainant and her sister as tenants in common (pp. 55-65), and the subsequent purchase of the interest of the sister by H. H. Gage; the bankruptcy proceedings of Wilson in full (pp. 283-305), including his petition filed August 30, 1878 (p. 284); his schedules showing secured indebtedness $8,700, unsecured indebtedness $2,144, including that of George A. Seaverns for about $1,200; assets, apparel $50, watch $20; no other assets scheduled; property in question not scheduled; Julia Wilson not named as creditor; the adjudication in bankruptcy, September 7, 1878 (p. 294); the appointment of R. E. Jenkins, assignee, September 15, 1879, and his acceptance; the deed to him from the register of the same date (p. 294); the sworn petition of George A. Seaverns, filed June 27, 1889, alleging (p. 296) himself a creditor of the bankrupt in a judgment of $1,879.81, obtained July 14, 1877, in the Superior Court of Cook county; that his proof of claim was filed; that the bankrupt at the filing of his petition was and has since been the owner of or interested in a large amount of real estate (described and including the premises in question), discovered by petitioner only within the last month, and praying that the assignee be ordered to sell the same for the benefit of the creditors of the bankrupt; the order of sale (p. 298) directing the assignee to sell at public auction "the interest of said bankrupt and of said assignee" in and to the said real estate; notice of sale; report of sale (p. 301) of the premises in question to Taylor A. Snow for $250; order confirming sale and approving report (p. 303); deed from assignee to Snow, dated July 22, 1889, conveying "all the right, title, interest, estate, claim and demand of the said bankrupt which he had on the 30th day of August, 1878, and of the said Robert E. Jen-

kins as assignee" (p. 66); petition of F. R. Wilson, filed September 17, 1889, praying (p. 304) that the orders of sale and confirmation and the sale aforesaid may be set aside because he has acquired title within the past three years; because all the property sold is worth not less than $30,000, and was sold for $660; because the premises in dispute are worth $17,000, but were sold for $250; because although he received notice of the second sale he received no notice that the first sale would take place, or that it had taken place and was confirmed, until after such confirmation, and he learned it then by notice of the second sale only. Order in said bankruptcy cause, entered November 6, 1899, overruling said petition (p. 305).

It was further shown in evidence upon said second hearing by the testimony of said Wilson, that he took possession of said premises under a tax deed in 1864 (p. 84), and retained possession until July 6, 1877, when he claims to have conveyed to Julia Wilson, his sister, by a quit claim deed, the premises in question, together with 110 pieces of other property, on a consideration mentioned in the deed of $2,000 (pp. 115, 221); that his sister was a resident of New Jersey, was never in Chicago, was an invalid for twenty years (p. 193), and had to be lifted in and out of bed and her food cut up for her (p. 224); that she had on July 28, 1876, signed, sealed and published her last will and testament, devising and bequeathing to F. R. Wilson all her property, both real and personal, and naming him as sole executor (p. 118); that he was her only heir at law (p. 122); that there was an arrangement made between them at the time said deed of July 6, 1877, was delivered, that said deed, although absolute in form, was given to her in the nature of a trust (p. 264), conditionally, that he should pay all the taxes and keep the property from being

sold, and if he didn't do so it was to go to her as a regular deed (p. 273); that it was in the nature of a trust deed (p. 261); that he was indebted to his sister; that she was constantly lending him money of which he kept no account (p. 233); that she supplied him with what money he requested for a number of years (p. 220); that she let him have what money he wanted whenever he asked it (p. 221); that he figured it up as accurately as he could and the amount he owed her was the consideration put in the deed (p. 221); that he couldn't remember whether he owed her any more; that there were no written documents; that if she had money she gave it to him; that she had implicit confidence in him (p. 239); that he did not know that there was any arrangement that if he could pay her what he owed her, then he was to get the property back—it made no difference (p. 224); that he gave it to her; that the deed was an absolute title to the property if he could not pay the taxes and keep it free from taxation; that the deed was given her in the nature of a payment for this money he had borrowed; that of course he knew that it would all come back to him, as she was an invalid (p. 240); that he was her only relative and knew what she possessed would come back to him (p. 234); that upon the former hearing he had testified that he meant when he said that the deed to Julia Wilson was in the nature of a trust deed that it was given with the understanding that he should pay all the taxes and keep the property from being sold, and if he didn't do so it would go to her; that he came to Chicago (from New Jersey) and found he could not raise the money to pay the taxes and had to let it go to sale; and so he delivered it to her as a genuine deed (p. 238); that he was very much hampered for money, couldn't raise money, and found he had to let it be sold (p. 274); that the amount was so great and the times were so hard that he couldn't pay the

taxes (p. 224); that real estate was very much depressed at that time, and nearly every business man in the city was going into bankruptcy; that Judge Gardner, his lawyer, advised him to go in (p. 233); that at that particular time he had an agent who had run away with his money (p. 238); that it was some time near 1880 that he deeded to his sister (p. 179); that it might be before or after that date a year or two; that he thought it was within two years of 1880 (p. 193); that he did not remember whether he took the deed to her or sent it by mail (p. 194); that it was recorded after her death; that she had a number of documents which she used to keep in a satchel under her pillow, and when she died they found a good number of things that ought to have been put on record in due time, and he wouldn't be surprised if this was one of them; that he put them on record immediately after her death (December 15, 1887) (p. 233); that from 1877 until his sister's death he was virtually the owner of that land; that she held it under a trust; that the deed was given to her in the nature of a trust (p. 264); that he transacted all her business and acted as her agent and attorney in fact (p. 264); that as to the rents he accounted to his sister what was coming to her from her property and the balance he kept for himself; that he had a good deal of her money also; that when she died he was a good deal in her debt (p. 179).

It also appears that after the date of the deed to Julia Wilson, F. R. Wilson, in his own name, leased a portion of said premises to Barbara Seufert, by lease, dated August 1, 1877 (p. 169); that other tenants of F. R. Wilson, to-wit, Beck, Lonu and Ludolph, were in possession of parts of said premises, remained in possession and continued to pay rents to Wilson without attornment to Julia Wilson; that the first lease in Julia Wilson's name was dated May

1, 1879, to Beck (p. 140), and the first rent appearing to have been collected by him as agent was indorsed in the above lease under date of August 1, 1879 (p. 143); that no one in any way interfered with his possession, or demanded possession (p. 177); that no person claiming any adverse interest to his ever occupied said premises since 1864 (p. 178).

It also appears that the premises were sold for taxes prior to the conveyance to the sister, in 1867, 1871, 1873, 1875, 1876 (pp. 73-83), and subsequent to the said conveyance, in 1879 (p. 69).

Last Decree.

The last decree of the Superior Court, entered July 8, 1901, found (p. 46) that at the time of the filing of the original and amended bills of complaint the premises in question were held, possessed and owned in fee simple absolute by defendant Frederick R. Wilson; that on May 26, 1864, he received from the city of Chicago a deed of conveyance of said land which was regular in form and was color of title and acquired in good faith; that for at least seven successive years next thereafter he paid all taxes legally assessed except a certain special assessment which he was legally required to pay under the seven years limitation statute. That from May, 1864, until July, 1877, he remained in the actual, notorious, exclusive, adverse and continuous possession thereof; and that from thence until December, 1887, Julia Wilson remained in like possession, and that the former possession coupled with the latter continued for over twenty years prior to the filing of the bill of complaint.

That prior to the bankruptcy proceedings in August, 1878, Frederick Wilson conveyed whatever title and interest he had in said lands to Julia Wilson, and that prior to

and at the time of the institution of said bankruptcy proceedings said Julia Wilson was in possession under said deed, which was a conditional sale of the estate therein described; that within two or three months after the execution and delivery of said deed, by reason of the failure and inability of F. R. Wilson to comply with the terms and conditions of said sale entitling him to a reconveyance, and in virtue of the agreement of the parties, said conveyance ceased to be a conditional sale and became an absolute sale, and the title of F. R. Wilson and all his interest therein became and was vested absolutely in Julia Wilson; that upon her death in December, 1887, all her right, title and interest therein became vested in F. R. Wilson, as her only heir and next of kin.

That six tax deeds conveying said real estate were issued during the years 1876, 1877, 1878, 1881; that they are irregular and void, and that no title passed by virtue thereof; that defendant Gage has paid certain taxes and special assessments on said premises (enumerating them). That defendant Snow acquired no title or interest in the land in question by the deed of conveyance thereof from Jenkins, assignee, under deed dated July 22, 1889; that at the time of the filing of the original and amended bills herein complainant Cramer and defendants Gage and Snow had no title or interest in said premises as against the interest of F. R. Wilson; that F. R. Wilson was then the legal and sole owner of said premises; orders payment to Gage of $3,162.62, paid by him at the several tax sales, and cancellation of tax deeds.

Assignment of Errors in Illinois Supreme Court.

Complainant sued out a writ of error from the Supreme Court of Illinois to reverse this decree, assigning as error (p. 306) the entry of the final decree; the finding that the

land in question was owned in fee simple by F. R. Wilson at the time of the filing of the bill; that his possession, coupled with that of Julia Wilson, continued over a period of more than twenty years prior to the filing of the bill; that the deed of July 6, 1877 was a conditional sale which became absolute within two or three months by reason of F. R. Wilson's inability to comply with the terms and conditions of the sale, and that the title vested in Julia Wilson, and upon her death in F. R. Wilson, her only heir at law and devisee; that defendant Snow acquired no interest in said premises by the deed from the assignee in bankruptcy; that F. R. Wilson was and is the legal owner of said premises.

Henry H. Gage (made a defendant in error) assigned as cross errors (p. 307) *inter alia* the finding that the title to the property in question was in F. R. Wilson; that the possession of Julia Wilson and F. R. Wilson was continuous during twenty years; whereas the fact is that said possession was interrupted by conveyance not coupled with transfer of possession.

Taylor A. Snow (made a defendant in error) assigned as cross errors (p. 308) *inter alia* the finding that the title was in F. R. Wilson instead of in this defendant; that the possession of the Wilsons was adverse to this defendant and was continuous during twenty years, whereas in fact said possession accrued to this defendant through the bankruptcy proceedings of F. R. Wilson; that no title passed to the assignee in bankruptcy upon said F. R. Wilson being adjudicated a bankrupt; in not finding that F. R. Wilson was at the time of being declared bankrupt owner of the equity of redemption of the property in question, and that said property passed to the assignee in bankruptcy through whom this defendant claims; in not finding that the conveyance from Wilson to his sister was a trust deed, and that

he thereafter still remained the owner of the land subject to said trust deed.

Opinion of the Illinois Supreme Court.

The Supreme Court of Illinois (202 Ill., 83) affirmed the decree of the Superior Court, holding in effect (p. 311) that the deed from Wilson to his sister was to secure his indebtedness to her; that in a short time thereafter, being unable to pay the taxes on the property and finding he could not repay to her the amount due her, it was agreed between them that the conveyance should be considered an absolute sale, and was so treated; that such an arrangement may be made by parol and be binding; that the assignee in bankruptcy was ordered to and did sell all the interest of Wilson; that Wilson's application to set aside said sale and the denial thereof did not constitute *res judicata* of the question involved herein, because the assignee was directed to sell only the interest of F. R. Wilson in the premises, which was the interest he had on August 31, 1878, the day on which he was adjudged bankrupt, and on which he had no interest; that the purchaser obtained all that was sold, viz., the interest of Wilson; if he had no interest, the purchaser obtained no interest; that the refusal of the court to set aside the sale and vacate the order confirming the same was not an adjudication that Wilson was the owner, or had any interest in the premises, as that question was not necessarily involved in the proceeding; that if the proceeding had taken place in the life time of Julia Wilson, she not being a party would not be bound; then why should her devisee be bound? And the court quotes from its former decision (152 Ill., 387), as follows: "Manifestly then the case must turn upon whether the Superior Court erred in finding against him (Wilson) on his claim of title on the ground that it

was diverted by the assignee's sale and conveyance to Snow. That he had possession under his deed and that he conveyed to his sister, Julia Wilson, is not denied. It must also be conceded that if she owned the property at the time of her death it passed under her will to him. It does appear that about a year after he made the deed to his sister he went into bankruptcy, and it is claimed by defendants in error that on motion of his creditors he was adjudged to still be the owner of the property and the same was ordered sold, and afterwards conveyed by his assignee to the purchaser." After passing some criticism on the abstract the court proceeds: "But the evidence shows that at that time he had no interest, having more than a year prior to that date, July 6, 1877, conveyed it to Julia Wilson, and the evidence is undisputed as to the fact that she took possession under that deed and retained it by her tenants to the date of her death, and that her tenants remained in such possession when this suit was begun. There being nothing to show that that deed was ever set aside or the property adjudged to remain in plaintiff in error, how can it be said that Julia Wilson did not die seized of it? Suppose she had willed it to a third party; would it be seriously contended under the evidence shown in this abstract, that such third party took no title under the will? We certainly think not. And we find nothing in this record upon which to have a distinction between the rights of plaintiff in error and any other devisee to whom she might have willed it."

Errors Assigned.

The complainant and defendants Gage and Snow have sued out from this court a writ of error to review the order of affirmance of the Supreme Court of Illinois, and have assigned as errors (p. 222): (1) the confirming by the court of the Supreme Court denying that the proceedings in

the United States District Court for the Northern District of Illinois, in the matter of Frederick E. Wilson, bankrupt, relating to the sale of the interest of the bankrupt and of his assignee conferred to the plaintiff in error there the premises in question, and ended the possession and possessory right of said Wilson thereto. (2) In holding that the continuity of adverse possession claimed by Wilson was not broken by the assignment in bankruptcy and the sale of his interest in the premises in question, and that the right, title and interest of one in [illegible] real estate does not pass to his assignee in bankruptcy, and is a good chose at assignee's sale. (3) In denying that the real estate conveyed in fraud of creditors passed to the assignee in bankruptcy by virtue of the Bankruptcy Act of 1867. (4) In holding that a purchaser of real estate at assignee's sale obtains only the right, title and interest of the bankrupt at the date of bankruptcy, although prior to bankruptcy he had conveyed said real estate in fraud of creditors, which holding is contrary to the Bankrupt Act of 1867, under which said sale was made. (5) In denying to the plaintiff in error the right to the premises in question accruing under a sale in said bankruptcy proceedings. (6) In holding that the title conveyed to plaintiff in error there by virtue of the sale in bankruptcy. (7, 8) In denying the plaintiff in error the rights accruing to them under the Bankrupt Act, 1867, the transfer by an assignment and thereunder of the possessory rights of said Wilson and the interruption thereby of the continuity of his alleged adverse possession. (9) In denying the effect of a foreclosure decree of the [illegible] to convey to plaintiff in error there by virtue of the Bankrupt Act of March 3, 1887, and amendatory thereto, and in denying the rights accruing to the plaintiff in error by virtue of the said assignee's conveyance. (10) In denying the right accruing to the plaintiff in error, or any of

them, through the decision of the said District Court of the United States in said bankruptcy proceedings, wherein said court refused to set aside the sale in said matter as prayed for by said bankrupt; and in denying that said adjudication is now *res judicata*. (11) In finding that the possession of Wilson and his sister was adverse to plaintiffs in error and was continuous during twenty years, whereas in fact said possession accrued to them or some one of them through said bankruptcy proceedings. (12) In sustaining a finding that no title passed to the assignee under the Bankrupt Act, and in not finding that Wilson was at the time of bankruptcy owner of the equity of redemption as held by the said District Court; and that said property passed to the assignee, through whom these plaintiffs in error (or one of them) claim.

QUESTIONS INVOLVED.

The questions involved are:

(1) Was the conveyance from F. R. Wilson to his sister made with intent to hinder and delay creditors, and therefore void?

(2) Did F. R. Wilson's interest in the premises in question pass to his assignee in bankruptcy as fully as if said conveyance had never been made? And from the assignee in bankruptcy to Snow?

(3) Was the action of the bankrupt court in denying Wilson's application to set aside the sale and confirming the same *res judicata* of the former questions?

(4) Was the adverse possession of Wilson (and the title dependent thereon) broken in consequence of the bankruptcy

proceedings and the fraudulent character of the deed to Julia Wilson?

The Supreme Court of Illinois evaded each of these questions except the third, holding in effect that the assignee in bankruptcy only took such title as the bankrupt had at the date of the bankruptcy, and ignoring the effect of a fraudulent conveyance under the Bankrupt Act; also the effect of the assignee's sale, in such case, and the decision of the bankrupt court sustaining the sale; and found generally against plaintiffs in error on other points, thereby in effect denying a right set up under a statute of, and an authority exercised under, the United States. Under such circumstances an evasion may be as effective as a direct decision. (*Chapman* v. *Goodnow,* 123 U. S., 540.)

It treated the case as if the only question involved was whether a deed absolute in form, but conditioned in fact, could be purged of the condition and become absolute *by a subsequent parol agreement* between the parties to the deed; and as if no one but said parties were concerned in the transaction. Whereas we contended that by virtue of the fraudulent conveyance the assignee took not only the interest which Wilson had at the date of bankruptcy and after the conveyance, but his full original interest prior to the conveyance, since in such case the assignee represented not the bankrupt but the defrauded creditors, whose interests were paramount to those of the bankrupt.

The foregoing questions were presented by the bill (p. 9), by the assignee's answer (p. 12), by defendant Gage's answer (Appendix), by Wilson's answer, by the supplemental bill (p. 14), by defendant Snow's answer, by the decision of the Supreme Court on first appeal (152 Ill., 387), by the amended bill (p. 24), by Wilson's answer (p. 30), by Snow's answer (p. 32) and cross bill (p. 42), by the evi-

dence of the bankruptcy proceedings (p. 283), by the decree of the Superior Court (p. 51), by the assignment of errors in the Supreme Court of Illinois (pp. 306, 307 and 308), and by the opinion and final order of that court (pp. 310-318).

POINTS.

(1) The foregoing are federal questions. (*Williams* v. *Heard,* 140 U. S., 529; *Central Nat. Bk.* v. *Stevens,* 169 U. S., 432, 460; *Dushane* v. *Beall,* 161 U. S., 513; *N. O. S. F. & L. R. R. Co.* v. *Delamore,* 114 U. S., 501; *Chapman* v. *Goodnow,* 123 U. S., 540.

(2) The deed to Julia Wilson was fraudulent and void as against creditors, because absolute in form but conditional in fact, creating a secret trust (*Lukins* v. *Aird,* 6 Wal., 78; *Beidler* v. *Crane,* 135 Ill., 92, 98; *Bostwick* v. *Blake,* 145 Ill., 85, 89; *Metropolitan Bank* v. *Godfrey,* 23 Ill., 579); because colorable; and because voluntary and made while the grantor was insolvent or contemplating insolvency. (*Dillman* v. *Nadelhoffer,* 162 Ill., 625.)

Such a deed is void not only as to existing but also as to subsequent creditors. (*Bostwick* v. *Blake* (*supra*); *Gordon* v. *Reynolds,* 114 Ill., 118, 127.) Hence no right or title passed to the sister by virtue of that deed as against creditors, but upon Wilson's bankruptcy all his original right and title passed to his assignee in bankruptcy, thereby breaking the continuity of the alleged adverse possession. Julia Wilson's subsequent possession, if any, being hostile to and not in privity with the assignee, was only the beginning of

a new limitation title which was incomplete at the time of the filing of the bill.

The Bankrupt Act of 1867 vested in the assignee all property of the bankrupt conveyed in fraud of creditors. (Sec. 5046 U. S. Rev. Stat.; *Holbrook* v. *Coney,* 25 Ill., 543, 547; *Foraast* v. *Hyman,* 138 Ill., 423); and no judicial determination of that fact was necessary to pass title (*Freeland* v. *Freeland,* 102 Mass., 475).

In such case an assignee in bankruptcy takes a different title from that of a state assignee or administrator (*Bouton* v. *Dement,* 123 Ill., 142; *Choteau* v. *Jones,* 11 Ill., 300); or from that of assignee in bankruptcy as to other property of the bankrupt not conveyed in fraud of creditors (*Hardin* v. *Osborne,* 94 Ill., 571).

That this asset was not scheduled is immaterial (*Holbrook* v. *Coney,* 25 Ill., 543).

Two years' limitation as to *suits* in bankruptcy has no application to *sales* (*Holbrook* v. *Brenner,* 31 Ill., 501); and if it has, it would only commence to run from the discovery of the fraud (*Beatty* v. *Nickerson,* 73 Ill., 605; *Dushane* v. *Beall,* 161 U. S., 513).

Election to take by assignee, if necessary, shown by sale. (*McKinny* v. *Farmers' Nat. Bk.,* 104 Ill., 130; *Freeland* v. *Freeland,* 102 Mass., 475.)

(3) All these questions are *res adjudicata* by the denial of Wilson's application to set aside sale, and he is estopped from raising them now (*Bennitt* v. *Star Mng. Co.,* 119 Ill., 9); not only as against the parties thereto, but as against all whose interests are involved (*Barney* v. *Patterson,* 6 H. & J., 182, 203); *Tyler* v. *Tyler,* 126 Ill., 525; *Jamison* v. *Beaubien,* 3 Scam., 113; *Rogers* v. *Bent,* 5 Gil., 573; *Kirkpatrick* v. *Clark,* 132 Ill., 342).

Whether the assignee *lost* his title by *laches* is immaterial; it is enough that he *acquired* title, though but for a day, to

interrupt the continuity of Wilson's possession (*C. & A. R. R. Co.* v. *Keegan*, 185 Ill., 70).

Not only Wilson's interest at the date of bankruptcy, but his assignee's interest also passed to the purchaser at the assignee's sale.

(4) The bankruptcy proceedings had the effect on Wilson's adverse possession of a voluntary conveyance, which breaks the continuity, even if the actual possession be not disturbed (*Gower* v. *Quinlan*, 40 Mich., 572; *Root* v. *Woolworth*, 150 U. S., 401; *Hintrager* v. *Smith*, 89 Iowa, 270; *Oberein* v. *Wells*, 163 Ill., 101; *Keegan* v. *C. & A. R. R.*, 185 Ill., 70).

(5) The deed to Julia Wilson being unrecorded was not notice (Ill. Rev. St., Chap. 30, Sec. 30); nor was Wilson's possession of the premises after the conveyance (23 Am. & Eng. Ency. of Law, 2d Ed., 506; *Robertson* v. *Wheeler*, 162 Ill., 566, 575).

Property fraudulently conveyed clothes the grantee with no ownership as against the creditors of the grantor. (1 Am. & Eng. Ency. of Law, 2d Ed., 813 (n); *Jones* v. *Wilson*, 69 Ala., 400; *Townsend* v. *Little*, 109 U. S., 504.)

(5) Julia Wilson participated in the fraud because the form of the deed alone was notice; because she was only a passive instrument to effect the grantor's illegal purpose; moreover, the principle of participation by grantee has no application if the transfer is voluntary. (14 Am. & Eng. Ency. of Law, 2d Ed., 271.)

The consideration of her deed being a past indebtedness, she is not within the exception of the statute of frauds relating to bona fide purchasers. (*Met. Bk.* v. *Godfrey*, 23 Ill., 579; *Powell* v. *Jeffries*, 4 Scam., 387.)

(6) The opinion of the Supreme Court of Illinois ignores the real character of the deed to Julia Wilson, and the effect of the bankruptcy proceedings and the Bankrupt

Act upon a conveyance in fraud of creditors. The fraudulent features of the deed could not be eliminated by the alleged subsequent agreement.

(7) The suggestion of collusion is ill timed and inconsistent. The motive in instituting the suit is immaterial. (*Trainor* v. *Greenough*, 145 Ill., 543, 549.)

STATUTES OF ILLINOIS APPLICABLE.

R. S., Chapter 106, Sec. 1. When land, tenements or hereditaments are held in joint tenancy, tenancy in common, or coparcenary, whether such right or title is derived by purchase, devise or descent * * * any one or more of the persons interested therein may compel a partition thereof by a bill in chancery as heretofore, or by petition in the Circuit Court of the proper county, or if the proceeding is in the County of Cook, in the Circuit Court or Superior Court of said county.

Sec. 6. Every person having any interest, whether in possession or otherwise, and who is not a petitioner, shall be made a defendant to such petition.

Sec. 39. In all suits for the partition of real estate, whether by bill in chancery or by petition under this act, the court may investigate and determine all questions of conflicting or controverted titles, and remove clouds upon the titles to any of the premises sought to be partitioned; invest titles by their decrees in the parties to whom the premises are allotted, without the forms of conveyance by infants or unknown heirs or other parties to the suit; assign, decree, and order a sale of the premises for the purpose of dividing the premises in proper cases, and by its decree invest the purchaser with title, and apportion incumbrances among the parties to whom the incumbered premises are allotted.

R. S., Chapter 59, Sec. 4. Every gift, grant, conveyance, assignment or transfer of, or charge upon any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to disturb, delay, hinder or defraud creditors or other persons * * * shall be void as against such creditors, purchasers and other persons.

Sec. 5. The foregoing section shall not affect the title of a purchaser for a valuable consideration unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

R. S., Chapter 30, Sec. 30. All deeds, mortgages and other instruments of writing which are authorized to be recorded shall take effect and be in force from and after the time of filing the same of record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record.

R. S., Chapter 83, Sec. 1. No person shall commence an action for the recovery of lands, nor make an entry thereon, unless within twenty years after the right to bring such action or make such entry first accrued, or within twenty years after he or those from, by, or under whom he claims have been seized or possessed of the premises, except as hereinafter provided.

ARGUMENT.

I.

Involved herein is the construction of the Bankrupt Act, and the determination of its applicability to this case, which are Federal questions; and the questions (also Federal) whether an assignee in bankruptcy is entitled to certain property of the bankrupt as against an adverse claimant (*Williams* v. *Heard,* 140 U. S., 529; *Dushane* v. *Beall,* 161 Ill., 513); and whether due respect has been given in a state court to a judgment of a Federal court (*Cent. Nat. Bk.* v. *Stevens,* 169 U. S., 432, 460; *N. O. S. F. & L. R. R. Co.* v. *Delamore,* 114 U. S., 501). The jurisdiction of this court cannot be ousted by the lower court's evasion in its decision of a Federal point duly set up in the record. (*Chapman* v. *Goodnow,* 123 U. S., 540.)

II.

The deed of Wilson to his sister, dated July 6, 1877, was a fraud on creditors, (1) because absolute in form, but conditional in fact, creating a secret trust. He says of it, that although absolute in form it was given to her in the nature of a trust, conditionally (p. 273); that from 1877 until his sister's death *he* was virtually the owner of that land; that she held it under a trust (p. 264).

In *Lukins* v. *Aird,* 6 Wall., 78, this court has said: "The law will not permit a debtor in failing circumstances, to sell his land, convey it by deed without reservation and yet secretly reserve to himself the right to possess and occupy it for a limited time for his own benefit. Such a transfer may be upon a valuable consideration, but it lacks the element

of good faith; for while it professes to be an absolute conveyance, on its face there is a concealed agreement between the parties to it inconsistent with its terms, securing a benefit to the grantor at the expense of those he owes. A trust thus secretly created, whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right, the right of possession, and gives to the debtor the beneficial enjoyment of what rightfully belongs to his creditors."

In *Beidler* v. *Crane,* 135 Ill., 92, 98, it is said:

"A conveyance of property which is absolute upon its face, but which is really intended as a mortgage or security is well enough between the parties; but the settled doctrine is that such a transfer of property is fraudulent and void as to creditors. * * * Its natural and necessary effect is to mislead and deceive and defraud creditors. *It is in substance and in fact the creation of secret trusts for the benefit of the assignor, and, as such, a fraud upon the rights of those to whom he is justly indebted.* Even if we should assume that the transfer was for valuable and ample considerations and was not, as a matter of fact, intended to accomplish covinous and dishonest purposes, *yet, as there were trusts which were not disclosed by the writings, and were therefore secret trusts,* it follows that the law itself regards the transactions as lacking the element of good faith and conclusively infers fraud, and that the courts are bound so to pronounce. * * * A deed fraudulent in fact is absolutely void as against creditors, and is not permitted to stand for any purpose of reimbursement or indemnity."

In *Bostwick* v. *Blake,* 145 Ill., 85, 89, it is said:

"The contention of appellee is that appellant obtained his sheriff's deed in pursuance with an arrangement with Blake, and held the same in secret trust for the latter at the time

of the levy of the writ of attachment. If this position is supported by the evidence, the conveyance is fraudulent in law and void as to creditors of Blake. It was held in *Moore* v. *Wood,* 100 Ill., 451, on the authority of numerous previous decisions of this court, as well as other authorities, *that a debtor can not convey real estate to another to be held wholly or in part in secret trust for himself,* so as to cut off the rights of existing creditors; for although such a transaction may be upon a valuable consideration it lacks the element of good faith; for while it professes to be an absolute conveyance on its face, there is a concealed agreement between the parties to it inconsistent with its terms, securing a benefit to the grantor at the expense of those he owes. A trust thus secretly created, whether so intended or not, is a fraud on creditors, because it places beyond their reach a valuable right * * * and gives to the debtor beneficial enjoyment of what rightfully belongs to his creditors. * * * *The theory of the law is that a fraudulent transfer passes nothing as against creditors. For all purposes of appropriating the property to the satisfaction of their demands, it is to be deemed as vested in the debtor.* A conveyance of real estate made in fraud of creditors *is void and not merely voidable.*"

In *Metropolitan Bank* v. *Godfrey,* 23 Ill., 579, 604, it is said:

"The authorities are conclusive upon the point, and reason speaks the same language that taking an absolute conveyance and attempting to set it up as a purchase when in truth it was merely security for debt, will under most circumstances, be regarded as a fraud, and would prevent the grantee from claiming as a bona fide mortgagee."

(2) The said deed was also a fraud on creditors because colorable. Wilson says that prior to this conveyance to his

sister she had published her will devising to him, her only heir at law, all her property (p. 118); that he knew that the property deeded to her would all come back to him as she was an invalid (pp. 240, 234); that he put it on record after her death (p. 233); that from 1877 until his sister's death *he* was virtually the owner of that land (p. 264).

He remained in possession after the transfer (she was never in Chicago, p. 193), in apparent control and dominion of the lot, collecting rents, renting in his own name (p. 164), and exercising all those acts of ownership and control which he had exercised before the deed was executed.

(3) Said deed was also fraudulent as to creditors because voluntary, and made when the grantor was insolvent, or contemplated insolvency.

The evidence discloses no contractual relationship of debtor and creditor between Wilson and his sister, no agreement to repay the moneys advanced to him by her, no note given, no time of payment fixed, no payment of interest, no amount of indebtedness ascertained or agreed upon, no account kept and no debt cancelled by her. He says he was indebted to this sister; that she was constantly lending him money of which he kept no account (p. 233); that she supplied him with what money he requested for a number of years (p. 220); that she let him have what money he wanted whenever he asked for it (p. 221); that there were no written documents (p. 239).

The evidence also discloses that at the time of the conveyance he was largely indebted; that he had been sued; that eight days later a judgment of $1,879.81 was obtained against him (p. 297); that his attorney advised him to go into bankruptcy. He says, I was very much hampered for money, couldn't raise money, and I found that I had to let it be sold for taxes the same year that she got the deed

(p. 274); that the taxes were so great and the times so hard that he couldn't pay them (p. 224); that real estate was very much depressed at that time and nearly every business man in the city was going into bankruptcy; that his lawyer advised him to go in (p. 233).

The evidence further discloses that this deed included 110 different pieces, substantially all his property (pp. 115, 221), and that he scheduled nothing in bankruptcy (p. 292).

"A conveyance by a debtor to a wife (or sister) is voluntary as to creditors where the only consideration therefor is certain sums of money furnished him by her at various times ranging from seven to thirty years before the conveyance is made, for which no note, acknowledgment or promise of repayment was taken, no account kept or payment of interest required." (*Dillman* v. *Nadelhoffer*, 162 Ill., 625.)

If it were essential to show that there were existing creditors of Wilson at the date of said deed (July 6, 1877), the evidence thereof is found in the record. George A. Seaverns obtained a judgment against him in the Superior Court of Cook county, July 14, 1877, for $1,879.81 (p. 297), on a merchandise account (p. 287). It does not appear when suit was commenced, but if the judgment was by default it must have been commenced on or before June 22, which was the last day of service for the July term; if not by default, it must have been commenced at least a year before to be reached regularly on the trial calendar, as it is called in Cook county.

Again, Wilson testifies that his attorney then advised him to go into bankruptcy (p. 233), which implies that he was then indebted.

But a conveyance absolute in form but conditional in fact, reserving a secret trust, or one colorable, or voluntary, when the grantor is insolvent, is void not only as to existing

but also as to subsequent creditors. "In such cases the conveyance is void both as to existing and subsequent creditors. The fraud is a continuing one and may actually operate as such as well in reference to debts contracted after as before the conveyance." (*Bostwick* v. *Blake,* 145 Ill., 85, 90; *Gordon* v. *Reynolds,* 114 Ill., 118, 127.)

III.

If the conveyance by Wilson to his sister was a fraud on creditors, it passed nothing as against them; but his interest in the property in question was vested in his assignee in bankruptcy.

The Bankrupt Act of 1867 (U. S. Rev. Stat., Sec. 5044) provided that the register should convey to the assignee all the estate, real and personal, of the bankrupt * * * and such assignment should relate back to the commencement of proceedings in bankruptcy, and by operation of law should vest the title to all such property and estate, both real and personal, in the assignee. (§5046) *That all property conveyed by the bankrupt in fraud of his creditors should in virtue of the adjudication in bankruptcy and the appointment of his assignee be at once vested in such assignee.*

Thus the act *proprio vigore* transferred to the assignee Wilson's interest in the property in question (*Holbrook* v. *Coney,* 25 Ill., 543, 547; *Foraast* v. *Hyman,* 138 Ill., 422), because it was "property conveyed in fraud of his creditors."

In this respect the title of an assignee in bankruptcy differs from that of an assignee or administrator under state laws which relates only to the property of the debtor or intestate belonging to them at the date of assignment or death, and prevents them from questioning a fraudulent convey-

ance which the grantor could not question (*Bouton* v. *Dement*, 123 Ill., 142; *Choteau* v. *Jones*, 11 Ill., 300); and it also differs from the title to property of the bankrupt which has *not* been conveyed in fraud of creditors, in which he takes no more interest than the bankrupt had at the commencement of proceedings. (*Harding* v. *Osborne*, 94 Ill., 571.)

The assignee, therefore, took the title and interest Wilson had attempted to convey to his sister (his whole estate).

That this asset was not scheduled by the bankrupt is immaterial. (*Holbrook* v. *Carey*, 25 Ill., 543.)

That it was not discovered by the assignee for ten years after the commencement of the bankruptcy proceedings, when it was by order of court sold, is immaterial, since there is no limitation in the act of the time of sale, the provision being that "upon petition of any person interested and for cause shown the court may make such order concerning the time, place and manner of sale as will, in its opinion, prove to the interest of creditors" (§5062). The two years' limitation as to *suits* (§5057) has no application to *sales* (*Holbrook* v. *Brenner*, 31 Ill., 501); and if it applied it would commence to run in case of fraud only from the discovery of the fraud. (*Beatty* v. *Nickerson*, 73 Ill., 605; *Dushane* v. *Beall*, 161 U. S., 513.)

As the conveyance was void and not merely voidable, no judicial determination of that fact was essential to vest title thereto in the assignee. If an election on his part was essential to the investiture of the title he manifested it by his answer herein, claiming Wilson's interest and invoking the court's decree to that effect (p. 12), and by his sale of the property to Snow, acts which were equivalent to a declaration of his election (*McKinney* v. *Farmers' Nat. Bk.*, 104 Ill., 180), and this election was made within one month after discovery of the fraud (p. 297, 12).

So that if the Bankrupt Act cast upon the assignee only an option to take or reject the title as he saw fit, he exercised the option to take immediately upon discovery of the fraud; and that option was properly exercised by selling, as he did, "all the right, title, claim and interest of the bankrupt and of himself," the assignee (p. 67), without first bringing an action to set aside the conveyance. (*Freeland* v. *Freeland*, 102 Mass., 475; 16 Am. & Eng. Ency. of Law, 2d Ed., 749.)

Again, all of these questions were involved (if not actually raised) in Wilson's application to the bankrupt court to set aside said sale. The court denied the application (p. 305).

That decision was acquiesced in by Wilson, for no appeal was prayed and no writ of error sued out. It is therefore *res adjudicata* as to him and estops him from now reopening the issues involved (*Bennitt* v. *Star M. Mo.*, 119 Ill., 9). That judgment and the bankruptcy proceedings generally (being documents connected with the chain of title) are available to all whose interests are affected, whether parties to those proceedings or not, and they are no more obnoxious to the objection that a judgment is only evidence in suits between the parties and privies than a deed or any other title paper which are *res inter alios acta* would be. (*Barney* v. *Patterson*, 6 Harrison & Johnson, 182, 203). Nor is the objection that only creditors can attack a fraudulent sale relevant, since the assignee in bankruptcy, who represented all creditors of Wilson, and Snow, the purchaser at assignee's sale, are parties hereto and are praying for a declaration of the effect of the bankruptcy proceedings on Wilson's title (pp. 12, 42).

Again, the fourth section of the Illinois Statute of Frauds (R. S., Ch. 59) makes void every conveyance of any estate

real or personal, "made with intent to disturb, delay, hinder or defraud creditors or *other persons*"—language sufficiently broad to include any one who is injuriously affected. (*Tyler* v. *Tyler*, 126 Ill., 525, 536; *Jamison* v. *Beaubien*, 3 Scam., 113; *Rogers* v. *Bent*, 5 Gil., 573.)

In ejectment defendant although not a creditor of the plaintiff may defeat recovery by showing that plaintiff's deed was made to hinder and delay creditors (*Kirkpatrick* v. *Clark*, 132 Ill., 342). The same rule should apply in partition, since it is, in part, a kind of equitable ejectment.

All questions as to whether the assignee *lost* his title by *laches*, irregularity in the sale, or in any other way, are irrelevant. It is enough that by operation of law he *acquired* title, and though he held it but for a day, it was long enough to break the continuity of Wilson's adverse possession, because the right of possession then passed from Wilson to his assignee.

At the date of the deed (1877) Wilson had such title as thirteen years' adverse possession would give; and at the date of his bankruptcy (1878) such title as fourteen years' adverse possession would give—an inchoate-possessory-title. Right of possession under that title was then interrupted by his bankruptcy and passed to his assignee. After that, Wilson or his privies might, no doubt, begin a new possession hostile to the assignee, but this possession could not be tacked to the former, for want of privity.

It is enough to say that Wilson's right of possession ceased, and that the sister by the deed obtained no right to tack.

The subsequent entry of the sister, if entry there was, constituted but a new dis-seizin and the statute as to her would begin to run from that date (1878). Between that date and the commencement of this suit (1888), only ten years intervened.

In *C. & A. R. Co.* v. *Keegan*, 185 Ill., 70, where Keegan and his wife were in actual possession for over twenty years, but five years after they went into possession Keegan deeded to Randall who, on the same day, deeded to Keegan's wife, without taking possession himself, it is said:

"The deed conveyed to Randall the right of possession. The holder of the legal title is the owner of the right of possession. * * * It is quite evident that when the deed was made to Randall, Keegan relinquished his claim to ownership and right of possession, and inasmuch as he thereby parted with his claim of ownership and right of possession without passing over the (actual) possession of the property to Randall the continuity of his adverse possession was broken and could not begin to run either in his own favor or that of his wife except from and after March 2, 1870 (the date of the Randall deed). It makes no difference that Randall held the title only for a short time. If the continuity is broken for a single day before the twenty years have elapsed the previous possession goes for nothing and the wrong-doer must commence *de novo.*"

It follows from the foregoing that the deed to Julia Wilson was void as against creditors and their representative, the assignee in bankruptcy, and passed no interest to her; that upon Wilson's bankruptcy his whole interest in the property in question, as it stood prior to the attempted conveyance, passed to his assignee by operation of law, unaffected by said conveyance, thereby ending his and his sister's possessory rights; that thereby the continuity of their possession was broken; that Julia Wilson's subsequent possession, if any, being hostile to and not in privity with the assignee, was only the beginning of a new limitation title which was incomplete at the filing of the bill herein.

The assignee by order of court (p. 298) sold not only the interest of Wilson which he had at the date of bankruptcy,

as was held by the Illinois Supreme Court, but also the interest of himself (the assignee)—that is, the interest vested in him by virtue of the fraudulent character of the conveyance of the bankrupt to his sister and the provisions of the Bankrupt Act—a very different interest from the bankrupt's; for while the bankrupt may have had no interest at the date of the bankruptcy by reason of the transfer to his sister, the assignee may have had the full original interest of the bankrupt prior to the conveyance, by virtue of the fraudulent character of that conveyance, since in such case he does not represent the debtor, but the defrauded creditors, whose interests are paramount to that of the debtor.

IV.

The bankruptcy proceedings had the effect on Wilson's adverse possession of a voluntary conveyance, which breaks the continuity of the grantor's possession, even if the actual possession be not disturbed. His subsequent possession is in subordination to the grantee. In *Gower* v. *Quinlan,* 40 Mich., 572, it is held that the continuity of adverse possession is broken by a decree requiring the occupant to convey the land, even if the actual possession is not disturbed; that it is equivalent to a voluntary conveyance. To the same effect are *Root* v. *Woolworth,* 150 U. S., 401; *Hintrager* v. *Smith,* 89 Iowa, 270; *Oberein* v. *Wells,* 163 Ill., 101.

Neither the assignee, the creditors nor third persons are chargeable with notice of the alleged transfer to the sister.

The deed to the sister not having been recorded until 1885, eight years after its date, was void as to creditors without notice, until recorded (Ill. R. S., Ch. 30, Sec. 30); and the continued possession of Wilson after the conveyance being consistent with the apparent title of the grantor, was

not notice to creditors or their representative, the assignee (23 Am. & Eng. Ency. of Law, 2d Ed., 506). No inference is to be deduced from the possession which is consistent with the possessory title on record (*Robertson* v. *Wheeler*, 162 Ill., 566, 575).

"Property conveyed in fraud of grantor's creditors under secret trust or otherwise clothes the grantee with no ownership to uphold a claim of adverse possession as against the creditors of the grantor" (1 Am. & Eng. Ency. of Law, 2d Ed., 813 (n).

In *Jones* v. *Wilson's Administrator*, 69 Ala., 400, it is held that where a debtor executed a deed to lands for the purpose of placing the title beyond the reach of his creditors and of creating a secret trust for his own benefit, he continuing in fact the real owner and enjoying the use, products and profits of the estate, and the grantee never having been in possession of and never having exercised or claimed any dominion or ownership over the lands conveyed, the grantee is not under such deed clothed with any ownership or asserted right which will uphold a claim of adverse possession against a creditor of the grantor seeking to subject the lands conveyed by the deed to the payment of his debts. And in *Townsend* v. *Little*, 109 U. S., 504, it is held, that a secret agreement between one and his wife, purposely kept concealed, cannot be set up against *bona fide* purchasers without notice.

V.

That Julia Wilson participated in the fraud of that conveyance is apparent from the fact that she was grantee in a deed the form of which in itself (being absolute, but conditional in fact) is the cause and evidence of its fraudulent character. Moreover, it appears that she was only a pas-

sive instrument in his hand to effectuate his purpose, and that his purpose was to save this land and put it beyond the reach of his creditors. He says that she had implicit confidence in him (p. 239); that she was an invalid for twenty years and had to be lifted in and out of bed (p. 224) and had devised to him all her property both real and personal; that he knew that what she possessed would come back to him (p. 234); that he transacted all of her business (p. 264).

Again, if this transfer was voluntary, the principle of participation in the fraud by the grantee has no application. The grantee in such case cannot claim the protection which is accorded purchasers, and though she may have been entirely innocent of any knowledge of the grantor's fraudulent interest she cannot hold the property against the claims of the latter's creditors (14 Am. & Eng. Ency. of Law, 2d Ed., 271).

And finally, since the consideration of the deed is not claimed to be other than past indebtedness, the grantee is not within the exception to the Statute of Frauds applicable to a purchaser for a valuable consideration (*Met. Bk.* v. *Godfrey,* 23 Ill., 579; *Powell* v. *Jeffries,* 4 Scam., 387).

VI.

In the opinion of the Supreme Court of Illinois in the case at bar, all fraud, actual or constructive, is eliminated from the case, and the character of the deed showing constructive fraud, the testimony showing actual fraud, the incongruity of allowing a party to a deed fraudulent in law as well as in fact to set it up in equity to defeat a paramount title, and the transfer to the assignee by the express provision of the Bankrupt Act of the title thus attempted to be conveyed, are passed over in silence. To eliminate these

is to eliminate the prominent and irrepressible features of the case.

The opinion proceeds upon the theory that it is sufficient to say that if the deed was a mortgage it could be foreclosed by an agreement between the parties to treat it as an absolute deed; and that the assignee took no other title than that which the bankrupt himself had or could have conveyed just prior to the bankruptcy; thus ignoring our position that the deed, although good as between the parties, was fraudulent and void as to creditors, and that the mortgage doctrine, although true and applicable as between the parties where no fraud is charged, is neither true nor applicable in a case where the rights of creditors are involved and the conveyance is fraudulent as to them. It would be passing strange if a deed void *ab initio* as to creditors could be subsequently purged of the fraud by a secret arrangement between the parties thereto, and be thereafter set up in a court of equity as a valid deed. This would do violence to the principle that a fraudulent deed is no deed as against the interest defrauded and cannot be permitted to stand in equity as a security, since reimbursement and indemnity cannot be invoked in equity by parties to a fraudulent transaction (*Beider* v. *Crane, supra*).

"An absolute deed made by a debtor to one creditor with the intention to defraud other creditors will not be adjudged an equitable mortgage at the solicitation of the debtor. * * Such a party is in no condition to ask a court of equity to interfere actively in his behalf to secure to him the fruits of his fraudulent devices." (Wait on F. C., 3d Ed., Sec. 404 a; *Mel. Bk.* v. *Godfrey, supra,* 604.) Courts of equity will not seek to enlarge the scope or legal effect of a transaction which is tainted with a design to defraud creditors.

According to the opinion, only the interest of Wilson at

the date of his bankruptcy was sold and passed to the purchase; while, according to our view of the law, both the interest of Wilson and also that of the assignee were sold and passed to the purchaser.

It is asked in the opinion, "Suppose the proceedings in the United States Court had taken place during the lifetime of Julia Wilson and the same orders had been made which were made, would it be claimed they would be binding on Julia Wilson?"

This question is misleading, because at the time the Seavern's petition to sell was filed (1889) Julia Wilson was dead (she died in 1887), and all her interest if any had passed to F. R. Wilson, her devisee and only heir at law. There were not then two titles, hers and his, but both were united and merged in him. He was therefore the only necessary, indeed the only possible party, and the whole title was involved. To say that Julia Wilson had an interest which was not sold is to assume, as the Supreme Court did, that the deed to her was valid as against creditors; that no question of fraud is involved; that the bankruptcy proceedings and the Bankrupt Act cut no figure. Moreover, Julia Wilson *was* a party to the proceedings in the United States Court through her devisee, who called upon the court to act. If she herself in her lifetime had made the same motion, the decision thereon would have bound her. The motion of her devisee after her death and the decision thereon are in effect the same as her own motion and a decision thereon.

It is said the mortgage feature of the deed was eliminated by parol and it then became operative as an absolute deed; but the fraudulent features of the conveyance—(the secret trust, the colorable and voluntary traits)—were not and could not be affected by such an agreement *inter partes;* indeed the agreement was only another device for carrying

out the illegal purpose of the original conveyance. If the effect of one fraudulent, secret agreement could be eliminated by another secret agreement very few fraudulent conveyances would ever be uncovered.

Whether the question of the effect of the bankruptcy proceedings upon Wilson's title thus fraudulently conveyed arose and was determined *therein* on the motion to set aside the sale, is not so important as whether the question arises *herein*. If not involved then, it is involved now, in a proceeding to ascertain and declare title, in which Julia Wilson was originally named a party, her death suggested, and F. R. Wilson substituted as her legal successor and substitute; and in which the assignee in bankruptcy, the purchaser at the assignee's sale, as well as the original owners of the property are parties.

In other words, if involved then it is *res adjudicata* and the state court is powerless to change the ruling; if not involved then it is now, and should be decided from the viewpoint of the Bankrupt Act.

VII.

It was urged below by defendant in error that this suit was collusive. Having become absolute owner, under a decree which he does not assail but accepts, made by a court whose jurisdiction he does not question, and before which he voluntarily appeared and put in issue the title to the premises, he is not now in a position to suggest collusion, the fruits of which he is now enjoying. Such a suggestion should not prejudice the case at the threshold nor cloud the judgment. Moreover, the question of motive in bringing the suit is irrelevant. In *Trainor* v. *Greenough*, 145 Ill., 543, 549, it is said: "There is no provision requiring that the parties shall be unable to agree between themselves in re-

gard to the partition as a condition precedent to the court taking jurisdiction in that respect. The right to have partition decreed between the parties is an absolute right resulting from the mere existence of the relations of joint tenants, tenants in common, parceners, etc. * * * Being entitled to have partition decreed, it is no more a question for the court what motive may have moved the party to ask the court to render the decree, than it is what motive moves a party to ask for judgment on an overdue note. In the latter case as in the former, it might be that it could be adjusted without the aid of the court."

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